BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2018-358-WS

In the Matter of:	
Verified Application of Carolina Water Service, Incorporated for Approval of Annual Rate Adjustment Mechanisms and Petition for an Accounting Order to Defer Expenses	**OBJECTION AND MOTION TO STRIKE**

Pursuant to S.C. Code Ann. Regs. 103-829(A), Blue Granite Water Company (the "Company") objects to and moves to strike a portion of the surrebuttal testimony of South Carolina Office of Regulatory Staff ("ORS") witness Matthew P. Schellinger, II, filed June 12, 2019. As discussed in more detail below, the testimony is inadmissible and improper because (1) the testimony introduces new issues on surrebuttal; (2) the testimony relies upon and includes testimony offered by other witnesses in other proceedings; and (3) Mr. Schellinger lacks the knowledge necessary to testify as to the matters discussed and the testimony is not based on his own observations or perceptions.

BACKGROUND

On November 14, 2018, Carolina Water Service, Inc.—now Blue Granite Water Company—filed for approval, with the Public Service Commission of South Carolina (the "Commission") in the above-referenced docket, certain proposed annual rate adjustment mechanisms for purchased water and wastewater treatment expenses and for authority to continue

to defer the Company's purchased water and wastewater treatment expenses (above or below the amounts reflected in base rates) until such expenses are reflected in rates. On December 5, 2018, the Commission denied the Company's request to implement the rate adjustment mechanisms without a hearing and instructed staff to establish a hearing date. Because the matter was set for hearing, the Company decided to seek recovery, as part of this proceeding, of the currently deferred expenses that would be recovered through the proposed rate adjustment mechanisms, i.e., actual purchased water and wastewater treatment expenses resulting from changes in third party providers' rates. The Company therefore filed a letter on January 11, 2019 providing notice of its intent to file an amended application that would propose recovery of such expenses, and then filed the amended application on February 21, 2019 ("Amended Application"). In order to expedite the Commission's consideration of the Amended Application, the Company also filed direct testimony supporting the Amended Application on February 21, 2019. On May 30, 2019, ORS filed the direct testimony of Mr. Schellinger. The Company thereafter filed rebuttal testimony of Robert Hunter on June 5, 2019, and ORS filed surrebuttal testimony on June 12, 2019.

ARGUMENT

The Company moves the Commission for an order striking the portion of the testimony of witness Schellinger beginning on page 14 at line 10 and ending on page 15 at line 15. This portion of Mr. Schellinger's testimony introduces novel issues that are not discussed in testimony filed by the Company, and it is improper and unduly prejudicial for ORS to introduce new evidence through surrebuttal testimony when the offered testimony is not responsive to that which was introduced by the Company. South Carolina caselaw limits reply testimony, which includes surrebuttal testimony, to that which responds to matters already raised.[1] As recently explained by the S.C.

[1] *See Daniel v. Tower Trucking Co.*, 32 S.E.2d 5, 10 (S.C., 1944) ("He upon whom lies the

Court of Appeals, "[t]estimony that is arguably contradictory and in reply to that offered by the defense is admissible. However, reply testimony should be limited to that which refutes or rebuts testimony presented by the defendant." *State v. Prather*, 422 S.C. 96, 104-05 (S.C. App., 2017). The policy reason underlying this longstanding rule is that it would be fundamentally unfair—arguably a violation of due process—for a party to raise an issue for the first time without other parties being given a corresponding opportunity to introduce responsive evidence. Raising an issue for the first time on surrebuttal deprives other parties the opportunity to respond, thereby prejudicially influencing the decision-making of this Commission. For this reason alone, the testimony should be stricken.

Further, the testimony in question references and relies upon testimony offered by other witnesses in unrelated proceedings. Schellinger's testimony quotes testimony offered by ORS expert witness David Parcell in the Duke Energy Carolinas, LLC and Duke Energy Progress, LLC general rate cases, Docket Nos. 2018-318-E and 2018-319-E. Mr. Schellinger also relies upon statements related to regulatory lag and ratemaking methodologies made in a recent ex parte briefing, Docket No. ND-2019-6. Admission of these statements made in other proceedings by declarants other than Mr. Schellinger would unfairly prejudice the Company by eliminating its right to cross-examine or elicit explanatory testimony from the original declarants.

The Company also submits that Mr. Schellinger's lay opinion testimony is inadmissible under SCRE 701. That rule provides as follows:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are

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burden of proof has the right to offer reply (rebuttal) testimony to that of his adversary and the latter's witnesses, provided it is in the nature of true reply and not such as should have been offered in the case in chief."); *State v. Farrow*, 332 S.C. 190, 194 (S.C. App., 1998) ("We thus hold the reply testimony . . . was improper because it was not presented to rebut evidence adduced by Farrow.") (citing *Daniel v. Tower Trucking Co.*, 205 S.C. 333, 32 S.E.2d 5 (1944)).

> rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

Mr. Schellinger testifies as to the relationship between the proposed pass-through mechanism and the Company's return on equity and financial performance, for which the Commission has traditionally required an expert. This testimony is in the form of opinions or inferences that require special knowledge, skill, experience or training that Mr. Schellinger, as a lay witness, does not possess. Further, based upon his reliance upon Mr. Parcell's testimony and statements made in the ex parte briefing, it is evident that Mr. Schellinger's testimony is not based on his own perceptions or observations but are instead based on his review of the perceptions of others.[2] Even if such statements are admitted, the Company submits that these opinions are of no probative value because Mr. Schellinger has offered no underlying evidentiary support. *See* Parker v. S.C. Pub. Serv. Comm'n, 314 S.E.2d 597, 599 (S.C., 1984).

WHEREFORE, the Company objects and moves to strike the testimony of ORS witness Schellinger as set forth above.

s/Samuel J. Wellborn
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[2] *See State v. Westmoreland*, 421 S.C. 410, 419 (S.C. App., 2017) ("Clevenger's opinion . . . was not based on his perceptions or observations but instead was based on his review of the perceptions of others. As a result, his testimony as a lay witness was improper opinion testimony under Rule 701(a).").